**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2005-0113, Brian Bilodeau & a. v. Town of Sandwich, ZBA, the court on January 26, 2006, issued the following order:**

The petitioners, Brian and Sandra Bilodeau, appeal an order of the trial court affirming the denial by the Town of Sandwich Zoning Board of Adjustment (ZBA) of the petitioners' request for variances. They contend that: (1) the requested variances were consistent with the public interest; (2) the ZBA and trial court erred in finding that the denial would not result in unnecessary hardship; (3) the ZBA and trial court erred by placing an unfair burden on them to prove that they could not build their house anywhere on a fifty-two acre lot without the variances and finding that their proposal did not comply with the spirit of the ordinance; and (4) the trial court failed to address the conduct of certain ZBA members indicating that they had unlawfully prejudged the application. We affirm.

We will uphold the superior court's decision unless it is unsupported by the evidence or legally erroneous. Boccia v. City of Portsmouth, 151 N.H. 85, 89 (2004). The superior court shall not set aside or vacate the ZBA's decision except for errors of law, unless the court is persuaded by the balance of the probabilities, on the evidence before it, that the decision is unreasonable. Id.

The requirements for a variance are statutory in origin. See RSA 674:33, I(b) (1996). To obtain a variance, a petitioner must show: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) the variance will not diminish the value of surrounding properties. Boccia, 151 N.H. at 89.

The ZBA found that the requests were not "minimal or slight requests" and that "if granted, they would be a very significant carving away of the protection buffers that our voters believed were appropriate and necessary for the protection of the town's wetland areas." The trial court found that the ZBA could have reasonably found that the number and scope of the petitioners' requested variances were not in keeping with the public interest of protecting town wetlands. The petitioners argue that their compliance with State-imposed setback requirements for wetlands provided sufficient protection of the public interest. If this were the standard, the adoption by towns of stricter standards would be a nullity. The legislature, however, has authorized municipalities to adopt stricter standards. See RSA 485-A:32 (2001). Therefore, while compliance with State-mandated setbacks may have provided some evidence, the ZBA could

have determined that the scope and number of the requested variances would fail to provide the protection intended by the zoning ordinances. See RSA 485-A:32 (2001).

Nor are we persuaded by the petitioners' argument that the ZBA and trial court erred in failing to find substantial hardship. The ZBA found that the petitioners did not prove that there were no alternative areas on which the building could be situated; the trial court ruled that the record supported this finding. Although the petitioners argue that this ruling required that they prove impossibility, we disagree. The issue before the ZBA was whether there was a reasonably feasible method or methods of effectuating the proposed use. Vigeant v. Town of Hudson, 151 N.H. 747, 752 (2005). The burden was on the petitioners to establish that there were no reasonably feasible alternatives. See Boccia, 151 N.H. at 89.

Having found that the trial court correctly ruled that the petitioners had failed to establish the lack of feasible alternatives, we need not address the petitioners' remaining arguments concerning the other standards for obtaining a variance.

The petitioners also argue that the trial court erred in failing to address their allegation that certain members of the ZBA had unlawfully prejudged their application. The petitioners have provided no evidence that they brought this alleged error to the attention of the trial judge. Accordingly, we conclude that it has not been properly preserved for our review. See LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270, 274 (2003) (supreme court will not consider issues on appeal not presented in lower court); N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679 (2002) (issues arising subsequent to trial may be raised before trial court in motion for reconsideration); Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (failure of moving party to demonstrate where question presented on appeal was raised below may be considered by court regardless of whether opposing party objects on those grounds).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,**
**Clerk**